

February 4, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in: CG Docket No. 10-207
CG Docket No. 09-158
WT Docket No. 08-7

Dear Ms. Dortch:

On behalf of Public Knowledge, this letter is to provide information relating to discussions between Public Knowledge (PK) and members of the Commission's staff on February 3, 2011.

Present at the meeting were: Harold Feld and Michael Weinberg, PK; and Joel Gurin, Mark Stone, Colleen Heitkamp, and Richard Smith, Consumer and Government Affairs Bureau, FCC.

PK noted that some parties have challenged the Commission's authority to include text messaging in its bill shock regulations, and suggested that resolving PK's outstanding text message petition might help address those concerns. PK highlighted the value of resolving the jurisdictional question surrounding text messages both for the bill shock proceeding and for the Commission generally. PK also challenged the assertions of some commenters that the Commission already recognizes text messaging as an information service.

With regard to authority to include data services in Bill Shock rules, PK stated the following: Section 201(b) of the Communications Act requires that charges and practices by common carriers be reasonable "for, *and in connection with*, any such communication services" (emphasis added). Carriers have a choice to offer freestanding data services, and many do. These services are classified by the FCC as "information services," and therefore – unless determined to be the functional equivalent of CMRS – are properly subject to Section 332(d)(2). Here, however, carriers are not only offering the data service "in connection with" the common carrier service, they are *requiring* that customers subscribe to the common carrier service as a necessary precondition of taking the non-common carrier service. It is difficult to imagine circumstances under which a non-common carrier is "offered . . . in connection with" a common carrier service and therefore subject to Section 201. Indeed, to accept the carrier interpretation to the contrary would be to read the words "in connection with" out of the statute.

To illustrate, Verizon has recently begun to offer a stand alone mobile data service on its new LTE network. From the advertisement, this appears to be a pure data service for laptops, and is thus covered by the FCC's 2007 ruling that such services are information services. Such a service would not be covered by Section 201. By contrast, Verizon's standard data service offered as part of its CMRS offering, which requires a Verizon-approved handset and a contract for common carrier voice service, is "offered with" CMRS and subject to Section 201.

Second, the fact that a regulation also appears in Title II does not make it a “common carrier” regulation. The Commission has long recognized that its Title III public interest authority includes rules for consumer protection and disclosure of information. The long-standing public file obligations on broadcasters, for example, are an example of the Commission’s ability to order disclosure as a means of promoting the public good. That Congress, by enacting certain provisions in Title II, required the Commission to establish minimum protections for common carrier subscribers regardless of the technology used does not mean that imposing similar consumer protections as a function of the FCC’s Title III authority is prohibited by Section 332(d)(2). Such an interpretation would affect a profound repeal of the Commission’s traditional authority under Title III, and nothing in the statute or legislative history suggests such an intent. To the contrary, as the Commission observed in its Order implementing Section 332, Congress intended Section 332 to set a minimum threshold of protection for consumers while preserving flexibility for the Commission to eliminate traditional common carrier regulation when appropriate. It would be inappropriate to reinterpret this as an implicit repeal the FCC’s traditional consumer protection authority under Title III.

With regard to requests for flexibility by smaller carriers, such as those represented by the Rural Carrier Association (RCA), PK recognized the concern that smaller carriers – particularly those serving high cost areas, underserved areas, or underserved populations – might have difficulty with compliance. Any exceptions to the rules to promote service, however, must be balanced against the need to ensure genuine consumer protection. This is particularly true for communities with only one provider or economically vulnerable communities. Such a balance might be struck by allowing smaller carriers to apply for waivers based on an explanation of how they will provide the appropriate level of consumer protection.

In accordance with the FCC’s *ex parte* rules, this document is being electronically filed in the above-referenced dockets today.

Sincerely,

_____/s/
Harold Feld
Legal Director
Public Knowledge

CC: Joel Gurin
Mark Stone
Colleen Heitkamp
Richard Smith